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No. 96 608 OCT 16 1996

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In The

Supreme Court of the United States

October Term, 1996

RANBIR S. SAHNI,

Petitioner,

vs.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION; KATZ BROTHERS DEVELOPMENT CORP. II; CONTINENTAL HOUSING PARTNERS, LTD.; MDC INVESTMENTS, INC.; PAULA QUINN; SKYLINE PROPERTIES and MATT MADISON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Financial Institution Reform Recovery and Enforcement Act of 1989 (FIRREA) grant to the Federal Deposit Insurance Corporation (FDIC), in its receivership capacity, the power to sell assets which are not owned by the failed institution which the FDIC operates?

2. Does FIRREA prohibit the district court from rescinding a sale of assets ordered by the FDIC as receiver for a failed depository institution?

3. Does FIRREA preempt the application of state law prohibiting certain actions by a general partner without the consent of the limited partners?

LIST OF PARTIES TO THE PROCEEDING

Ranbir S. Sahni —*Petitioner.*

Federal Deposit Insurance Corporation, as receiver for American Diversified Savings Bank —*Intervenor.*

American Diversified Partners — *Nominal Defendant-Respondent.*

American Diversified Investment Corporation; Katz Brothers Development Corp. II; Continental Housing Partners, Ltd.; MDC Investments, Inc.; Paula Quinn; Skyline Properties; and Matt Madison — *Respondents.*

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OPINION BELOW

Ranbir S. Sahñi, Plaintiff-Appellant v. American Diversified Partners, et al., Defendants-Appellees, United States Court of Appeals for the Ninth Circuit, Case No. 94-56534.

STATEMENT OF JURISDICTION

(i) The judgment sought to be reviewed was filed by the United States Court of Appeals for the Ninth Circuit on May 7, 1996.

(ii) Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on July 18, 1996.

(iii) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of 12 U.S.C. § 1464(d)(6)(C); 12 U.S.C. § 1821(d)(2)(B)(i),(ii),(iv); 12 U.S.C. § 1821(d)(2)(G)(i)(II); 12 U.S.C. § 1821(j) and California Corporations Code § 15509 appear in Appendix E, *infra.*

STATEMENT OF THE CASE

Petitioner Ranbir S. Sahni formed and was the sole general partner of many partnerships whose purpose was to build apartment projects financed largely by the Department of Housing and Urban Development (HUD partnerships). Petitioner acquired a controlling interest in a bank, intending to merge it with another corporation he controlled to form

American Diversified Savings Bank (ADSB), a state chartered financial institution. California banking authorities required that Petitioner divest his partnership interests in the HUD partnerships, and in order to satisfy the banking authorities' request, Petitioner formed American Diversified Partners (ADP), a limited partnership, composed of American Diversified Investment Corporation (ADIC), a wholly owned subsidiary of ADSB, as general partner and Petitioner as sole limited partner. ADP then became the general partner of the various HUD partnerships.

The Federal Deposit Insurance Corporation (FDIC) became receiver for ADSB following its insolvency. Litigation between Petitioner and the FDIC culminated in a settlement agreement that provided for, among other things, the assignment of 99% of Petitioner's cash benefits in ADP to the FDIC.

ADP's general partnership interests in several of the HUD partnerships were sold without Petitioner's informed, written consent.

Petitioner brought several derivative actions on behalf of ADP in state court seeking to rescind the sales of ADP's partnership interests, naming ADP, ADIC and the various purchasers as defendants. The FDIC intervened and removed the consolidated cases to the United States District Court under 12 U.S.C. § 1819(b). The FDIC moved to dismiss the case pursuant to 12 U.S.C. § 1821(j) for lack of subject matter jurisdiction, and other defendants joined in the motion. The district court granted the motion to dismiss. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals affirmed the judgment of the district court and held, among other things, that because the FDIC was acting in its capacity as receiver and within its statutory powers

as receiver for ADSB when it sold ADP's general partnership interests in the HUD partnerships,[1] the district court acted properly in dismissing Petitioner's action to rescind those sales under 12 U.S.C. § 1821(j). Additionally, the Court of Appeals held that a California statute requiring general partners to obtain written consent or ratification from limited partners in order to do certain acts was not applicable to this case and even if it were, it would be preempted by federal law.

REASONS FOR GRANTING THE WRIT

I.

FEDERAL LAW DOES NOT GRANT TO THE FDIC AS RECEIVER THE POWER TO SELL ASSETS WHICH ARE NOT OWNED BY THE FAILED INSTITUTION WHICH THE FDIC OPERATES.

In ruling that the FDIC, as receiver, has the power to dispose of assets which belong to entities separate and apart from the failed institution which it operates, the Ninth Circuit Court of Appeals has set a precedent which conflicts with the decision of the Supreme Court announced in *O'Melveny & Meyers v. FDIC*, __ U.S. __, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994). Moreover, the question of the scope of the estate administered by the FDIC in its capacity as receiver of a failed financial institution presents an important federal question which should be settled by the Supreme Court.

The Financial Institution Reform Recovery and Enforcement Act of 1989 (FIRREA) grants the FDIC, as receiver, express authority to dispose of receivership assets

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1. In its published opinion the Court of Appeals mistakenly referred to the assets sold as "the HUD partnerships."

when federally insured depository institutions such as ADSB fail. In such a case, as receiver, the FDIC has authority to "take over the assets of . . . the institution," and "preserve and conserve the assets and property of such institution." 12 U.S.C. § 1821(d)(2)(B)(i)(iv). The FDIC may also "transfer any asset . . . of the institution . . . without any approval, assignment or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II).

A fair reading of the applicable FIRREA sections set forth above gives no indication that Congress intended to include within the receivership estate assets and property which are directly owned by entities other than the failed institution.

Following the reasoning of the Supreme Court as expressed in *O'Melveny & Meyers v. FDIC*, __ U.S. __, 114 S. Ct. 2048, 2051-52, 129 L. Ed. 2d 67 (1994), the provisions of FIRREA place the FDIC "in the shoes of the insolvent S&L, to work out its claims under state law, except where some provisions of the extensive framework of FIRREA provides otherwise." (*O'Melveny*, p. 2055). However, the decision of the Ninth Circuit Court of Appeals is contradictory to the teachings of *O'Melveny*. Here, without the benefit of some other provision of FIRREA, the Ninth Circuit Court of Appeals has elevated the power of the FDIC above that of ADSB, the failed institution it operates.

The framework of FIRREA does not define the meaning of ownership; nor does it define the term "asset", nor does there appear to be any federal definition pertaining thereto. Under state law, ADSB has no right to disregard the partnership entity of ADP, ignore the state law rights of ADIC's partner and liquidate the assets of ADP. Instead, ADSB, as a state chartered institution, may exercise control over its subsidiary corporation, ADIC, only in ADSB's capacity as the shareholder

of ADIC. In turn, ADIC may control the affairs of ADP only in ADIC's capacity as general partner of ADP, in accordance with applicable state law.

Applicable state and federal laws recognize ADIC and ADP as entities separate and distinct from their respective owners. Fed. R. Civ. Proc. 17(a); California Corporations Code, § 15008; California Code of Civil Procedure, § 369.5; *Artana v. San Jose Scavenger Co.*, 181 Cal. 627, 185 P. 850 (1919). Yet, in its opinion, the Ninth Circuit Court of Appeals disregarded the existence of the partnership entity of ADP and the corporate entity of ADIC. (Opinion, 11a, n.3). Relying upon the "chain of ownership"[2] indirectly liking the failed institution to the assets sold, the Ninth Circuit Court of Appeals reasoned that the assets sold "were part of the receivership estate of ADSB," (Opinion, p. 11a). In this, the court also overlooked the *O'Melveny* requirement that the FDIC "work out its claims under state law, except where some other provision of . . . FIRREA provides otherwise."

II.

FEDERAL LAW DOES NOT PROHIBIT THE DISTRICT COURT FROM RESCINDING A SALE OF ASSETS ORDERED BY THE FDIC AS RECEIVER FOR A FAILED DEPOSITORY INSTITUTION.

The decision of the Ninth Circuit Court of Appeals providing that the district court was without jurisdiction to rescind the sale of assets ordered by the FDIC is in conflict with the decision of the Supreme Court announced in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S. Ct.

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2. ADSB owned all of the shares of ADIC; ADIC was the general partner of ADP; ADP was the general partner of the HUD partnerships.

1361, 103 L. Ed. 2d 602 (1989). In so ruling, the Court of Appeals relied upon 12 U.S.C. § 1821(j) which, except under circumstances not applicable here, prohibits courts from taking any action "to restrain or affect the exercise of powers or functions of the [FDIC] as conservator or receiver."

In 1989, Congress enacted FIRREA, which re-enacted the relevant part of 12 U.S.C. § 1464(d)(6)(C) verbatim in 12 U.S.C. § 1821(j). It is well settled that, when Congress re-enacts a statute, it is presumed that Congress intended that the re-enacted law be afforded the same judicial interpretation applied to its predecessor. *Lindahl v. Office of Personnel Mgt.*, 470 U.S. 768, 802, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985). Congress has expressly stated that 12 U.S.C. § 1821(j) is no more than a re-enactment of 12 U.S.C. § 1464(d)(6)(C) (House Report Number 101-54(I), 101st Congress, 1st Session 1989, at page 334).

In *Coit* the Supreme Court ruled that courts may grant injunctive relief against the FDIC if the power sought to be enjoined is beyond the powers granted by statute. *Coit* at 574. The *Coit* decision also made it clear that the "sue and be sued" provision of former 12 U.S.C. § 1725(c)(4) provides the waiver of sovereign immunity allowing the FDIC to be sued in any court of law or *equity*.[3] *Coit* at 576.

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3. This section was re-enacted in FIRREA as 12 U.S.C. § 1819(a).

III.

FIRREA DOES NOT PREEMPT THE APPLICATION OF STATE LAW PROHIBITING CERTAIN ACTIONS BY A GENERAL PARTNER WITHOUT THE CONSENT OF THE LIMITED PARTNERS.

In the instant case, the Ninth Circuit Court of Appeals held that even if California Corporations Code, § 15509(b) did apply to prohibit actions taken by the FDIC in causing the sale of ADP's assets without the consent of Petitioner as a limited partner in ADP, state law is preempted by 12 U.S.C. § 1821(d)(2)(G)(i)(II). (Opinion, p. 13a). However, the Supreme Court has questioned whether the provisions of FIRREA would operate retroactively and apply to the ADSB receivership which began prior to the enactment of FIRREA. *O'Melveny* at 2054-55.

In any event, the provisions of 12 U.S.C. § 1821(d)(2)(G)(i)(II) which permit the FDIC to transfer assets without any approval, assignment or consent with respect to such transfer is limited to those transfers made by the FDIC as conservator or receiver of a failed institution. Thus, if the actions of the FDIC in causing the sale of ADP's assets were taken outside of its capacity as receiver of ADSB, 12 U.S.C. § 1821(d)(2)(G)(i)(II) is unavailing.

CONCLUSION

The Supreme Court should grant the Petition for a Writ of Certiorari. The published decision of the United States Court of Appeals for the Ninth Circuit conflicts with the Supreme Court decisions set forth in both *O'Melveny & Myers v. FDIC*, __ U.S. __, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) and *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S. Ct. 1361, 103 L. Ed. 2d 602 (1989). Moreover, the question of the scope of the estate administered by the FDIC in its capacity as receiver of a failed institution presents an important federal question which should be settled by the Supreme Court.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 18, 1996

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56534

RANBIR S. SAHNI,

Plaintiff-Appellant,

v.

AMERICAN DIVERSIFIED PARTNERS; AMERICAN DIVERSIFIED INVESTMENT CORPORATION; KATZ BROTHERS DEVELOPMENT CORPORATION II; DOES, 1 THROUGH 50, INCLUSIVE,

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Defendants-Appellees.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for American Diversified Savings Bank,

Cross-claimant-Appellee,

v.

RANBIR S. SAHNI,

Cross-defendant-Appellant.

Appendix A

ORDER

BEFORE: WALLACE, FERGUSON, and NELSON, Circuit Judges.

The opinion of the court has been amended by deleting footnote 1 from the opinion.

With the opinion as amended, the petition for rehearing is DENIED.

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94-56534

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 7, 1996

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-56534

D.C. No.
CV-93-01072-GLT

ORDER AND AMENDED OPINION

RANBIR S. SAHNI,

Plaintiff-Appellant,

v.

AMERICAN DIVERSIFIED PARTNERS: AMERICAN DIVERSIFIED INVESTMENT CORPORATION; KATZ BROTHERS DEVELOPMENT CORPORATION II; DOES, 1 THROUGH 50, INCLUSIVE,

Defendants-Appellees.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for American Diversified Savings Bank,

Cross-claimant-Appellee,

v.

RANBIR S. SAHNI,

Cross-defendant-Appellant.

Appendix B

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
February 5, 1996 — Pasadena, California

Filed May 7, 1996
Amended July 24, 1996

Before: J. Clifford Wallace, Warren J. Ferguson, and
Thomas G. Nelson, Circuit Judges.

* * *

COUNSEL

Ronald E. Gregg, Santa Ana, California, for the appellant.

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Linda L. Northrup, Esq., Law Offices of Linda L. Northrup, P.C., Los Angeles, California, for appellees Continental Housing Partners, Ltd., MDC Investments, Inc. and Resco Management, Inc.

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Appendix B

ORDER

The opinion of this Court in this case which was filed May 7, 1996, is amended as follows; Footnote 1 of *Sahni v. American Diversified Partner,* No. 94-56534 (9th Cir. May 7, 1996) is deleted and the subsequent footnotes are renumbered.

OPINION

FERGUSON, Circuit Judge:

In the late 1970's Sahni, the plaintiff-appellant, formed and was the sole general partner of over 50 limited partnerships whose purpose was to build apartment projects financed largely by the Department of Housing and Urban Development (the "HUD partnerships").

In 1983, Sahni purchased Tokay Bank, intending to merge it with another one of his corporations to form American Diversified Savings Bank (ABSB or "the Bank"). California banking authorities required that Sahni diverst his partnership interests in the HUD partnerships. Sahni completed a series of complex transactions in an attempt to satisfy the banking authorities' request that he divest his partnership interests. First, Sahni formed ADSB (the Bank), and installed himself as Chairman and CEO. He also formed ADP, a limited partnership, and made himself the sole limited partner. ADIC a wholly owned subsidiary of the Bank was then formed, and ADIC became ADP's general partner. Lastly, Sahni substituted ADP as general partner of the HUD partnerships. The FDIC has implied that Sahni completed these transactions in order to evade the banking authorities' request that he divest his interest in the HUD partnership.

Appendix B

In 1986, the Bank was declared insolvent and placed in conservatorship. By 1989, the FDIC had become the Bank's receiver. Litigation began shortly thereafter between Sahni and the banking agencies, culminating in a comprehensive settlement agreement in December 1990. The settlement agreement provided for a substantial payment by Sahni to the FDIC retention by Sahni of certain assets not subject to this appeal, and the transfer of all ownership interests in ADSB and its controlled entities to the FDIC for liquidation, except for a 1% interest retained by Sahni in the distributive share of ADP partnership income.

From 1990 to late 1991, several of their HUD partnerships and ADP's general partnership interests in the HUD partnerships were sold as part of the FDIC's liquidation of ADSB's assets. In 1991, the FDIC offered a bulk sale of the remaining ADP partnership interests. These interests were offered along with notes which were payable by the purchasers of the HUD partnerships directly to the FDIC. The FDIC was listed as the seller on these purchase agreements.

In February 1993, Sahni filed five lawsuits in state court seeking to rescind the FDIC sales of the HUD partnerships. Sahni named as defendants ADP, ADIC, and the third party purchasers of the HUD partnerships. These five cases were consolidated. Subsequently, the FDIC intervened and removed these consolidated cases to federal court pursuant to 12 U.S.C. § 1819(b)(2)(B). The FDIC then moved to dismiss the case pursuant to 12 U.S.C. § 1821(j) for lack of subject matter jurisdiction. All other defendants joined in this motion. The district court granted the FDIC's motion to dismiss. Sahni now appeals the district court's decision on the grounds that: (1) the FDIC lacked standing to intervene; and (2) the district court erred in dismissing Sahni's complaint pursuant to § 1821(j).

Appendix B

We review questions of standing de novo. *Barrus v. Sylvania,* 55 F.3d 468, 469 (9th Cir. 1995). The existence of subject matter jurisdiction is a question of law reviewed de novo. *Resolution Trust Corp. v. Midwest Fed. Sav. Bank,* 36 F.3d 785, 790 (9th Cir. 1993).

I. *Standing*

Sahni contests the standing of the FDIC in the present case.[1] In *Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56 (9th Cir. 1994), this court set out the requirements for standing:

> Standing has constitutional and prudential dimensions. The Article III limitations are '(1) a threatened or actual distinct and palpable injury to the plaintiff; (2) a fairly traceable causal connection between the injury and the defendant's challenged conduct; and (3) a substantial likelihood that the requested relief will redress or prevent the injury.' The prudential limitations include a requirement that the plaintiff 'assert his own rights, rather than rely on the rights or interests of a third party' and 'allege an interest that is arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question.'

Id. at 61 (citations omitted).

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1. The FDIC intervened in state court pursuant to Cal. Civ. Proc. Code § 387(a),(b). The FDIC's right to intervene is not questioned on appeal. Rather, Sahni contests the standing of the FDIC.

Appendix B

Both the constitutional and prudential requirements for standing are satisfied in the present case. First, the constitutional requirements are met because the FDIC faces an injury which is directly traceable to Sahni's request for rescission of the HUD partnership sales. The FDIC was a party to all of the HUD partnership sales and was listed as the seller on these purchase agreements. Moreover, the notes coupled with the HUD partnership sales were owned by the FDIC as receiver, and were payable directly to the FDIC. Some purchasers would have refused to buy the HUD partnerships if they had not been coupled with the FDIC notes. If the HUD partnership sales are rescinded, the FDIC faces not only the loss of the sales of the HUD partnerships, but also potential liability to the buyers under the purchase agreements. Finally, rescission of the HUD partnership sales would curtail the ability of the FDIC to fulfill its statutory mandate because rescission would have a chilling effect on the FDIC's future sales of ADSB's assets. *See Pyramid Constr. Co. v. Wind River Petroleum, Inc.*, 866 F.Supp. 513, 519 (D. Utah 1994) (recognizing that future transactions by the Resolution Trust Corporation might be unduly chilled if the RTC's asset sales were enjoined). The FDIC's power to liquidate the assets of a failed institution is critical to its ability to rescue failed institutions and the FDIC would suffer injury if this power was constrained.

Second, the prudential requirements for standing are satisfied as well. The FDIC is asserting its own rights as receiver of ADSB and of ADSB's assets. Moreover, the FDIC's right to liquidate the assets of ADSB is clearly protected by the statutes in question — 12 U.S.C. § 1821(d) and 12 U.S.C. § 1821(j).

Appendix B

II. *12 U.S.C. § 1821(j)*[2]

Sahni alleges on appeal that the district court lacked subject matter jurisdiction to dismiss his lawsuit. Sahni further asserts that even assuming the district court did have jurisdiction, § 1821(j) did not create a basis for dismissal because either: (1) no equitable relief was sought against the FDIC as receiver of ADSB; or (2) controlling case law has previously interpreted 12 U.S.C. § 1821(j) not to preclude equitable relief against the FDIC.

A. The Powers of the FDIC When Acting as Receiver

Congress has granted the FDIC as receiver express statutory authority to dispose of receivership assets, thereby reducing the losses borne by federal taxpayers when federally insured financial institutions, such as ADSB, fail. As receiver, the FDIC has broad authority to "take over the assets . . . and conduct all business of the institution," "collect all obligations and money due the institution," and "preserve and conserve the assets and property of such institution." 12 U.S.C. § 1821(d)(2)(B)(i), (ii), (iv). Moreover, the FDIC may "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution. . . ." 12 U.S.C. § 1821(d)(2)(E). The FDIC as receiver may also "transfer any asset or liability of the institution in defaults . . . without any approval, assignment, or consent. . . ." 12 U.S.C. § 1821(d)(2)(G)(i)(II). Finally, the FDIC may "exercise . . . such incidental powers as shall be necessary to carry out such

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2. 12 U.S.C. § 1821(j) was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), codified at 12 U.S.C. § 1811 et seq.

powers," and "take any action authorized by this Chapter, which the [FDIC] determines is in the best interests of the depository institution, its depositors, or the [FDIC]." 12 U.S.C. § 1821(d)(2)(J)(i), (ii).

Indeed, the breadth of the FDIC's statutory powers as a receiver are reflected in the legislative history of 12 U.S.C. § 1821. Congress explained that the authority granted to the FDIC was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 2 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 126. *See West Park Assoc. v. Butterfield Sav. & Loan Ass'n,* 60 F.3d 1452, 1458 (9th Cir. 1995) (explaining that the FDIC is broadly authorized to take appropriate steps in dealing with distressed institutions);*Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 398 (3d Cir.),*cert. denied,* 502 U.S. 981 (1991).

Essential to these enumerated powers is the FDIC's ability to carry out its basic functions as a receiver free from judicial restraint, pursuant to 12 U.S.C. § 1821(j), entitled "Limitation on count action," states that "[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers of functions of the [FDIC] as a conservator or a receiver."

It is well-established that § 1821(j) bars restraint by the courts on the statutory powers of the FDIC when it acts as receiver. *See In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) (stating that the comprehensive scheme of FIRREA, which includes 12 U.S.C. § 1821(j), indicates Congress' intent to allow the RTC full reign in exercising its statutory authority

without injunctive restraints imposed by the courts); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 102-04 (5th Cir. 1993) (stating that the RTC is free to liquidate receivership assets without being encumbered by the possibility of injunctive actions, and further explaining that recession is even more problematic than an injunction); *Telematics Int'l., Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 705 (1st Cir. 1992).

B. Application of the FDIC's Powers as a Receiver to the Present Case

Because the FDIC was acting within its statutory powers as receiver for ADSB when it sold the HUD partnerships, the district court acted properly in dismissing plaintiff's action to rescind these sales.

Sahni alleges that the FDIC was not acting in its capacity as receiver for ADSB when the FDIC sold the HUD partnerships, but rather in its capacity as general partner of American Diversified Partners (ADP). However, Sahni is mistaken. All of the assets sold by the FDIC were part of the receivership estate of ADSB.[3] Therefore, the FDIC was acting as receiver when it sold the HUD partnerships. *See Bender v. CenTrust Mortgage Corp.*, 833 F.Supp. 1525, 1536-37 (S.D. Fla. 1992) (stating that the assets of a wholly owned subsidiary are clearly the assets of its parent corporation and that FIRREA empowers the FDIC to

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3. The HUD partnerships were sold as part of the ADSB receivership estate by virtue of the following chain of ownership; (1) ADSB owned American Diversified Investment Corporation (ADIC); (2) ADIC was the general partner of American Diversified Partners (ADP); (3) ADP owned the HUD partnerships; (4) Therefore the HUD partnership were the assets of ADSB.

see a failed institution's assets, whatever they may be, free from judicial interference), *appeal dismissed,* 51 F.3d 1027 (1995); *In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) (holding that the district court lacked jurisdiction to enjoin the RTC, acting as conservator of a failed thrift, from exercising its ownership rights over the thrift's subsidiaries).

The granting of Sahni's request in the present case to rescind the asset sales by the FDIC would constitute an improper judicial restraint on the FDIC in violation of § 1821(j). *See Ward v. Resolution Trust Corp.* 996 F.2d 99, 104 (5th Cir. 1993) (holding that § 1821(j) deprives a district court from enjoining or rescinding a sale by the RTC of the assets of a failed thrift).

In sum, the FDIC was acting well within its broad statutory powers as receiver when it sold the HUD partnerships. Therefore, 12 U.S.C. § 1821(j) bars the remedy of rescission sought by Sahni. The district court was correct to dismiss Sahni's complaint pursuant to § 1821(j).

III. *California Corporations Code § 15509*

Sahni asserts that the FDIC violated California Corporations Code § 15509 by failing to attain Sahni's consent, as limited partner, to the sale of the HUD partnerships. Cal. Corp. Code § 15509 provides in pertinent part that, "a general partner shall . . . without the written consent or ratification of the specific act by all the limited partners . . . have no authority to . . . (b) Do any act which would make it impossible to carry on the ordinary business of the partnership."

Plaintiff is mistaken in his application of Cal. Corp. Code § 15509 to the facts in the present case. Section 15509 addresses

the rights, powers, and liabilities of general partners. However, when the FDIC sold the HUD partnerships, the FDIC was not acting as a general partner, but rather in its capacity as receiver pursuant to 12 U.S.C. § 1821(d). Therefore, Cal. Corp. Code § 15509 is not applicable to the facts in this case.

Moreover, even if Cal. Corp. Code § 15509 was applicable to the facts in the present case, it would be preempted by federal law. Congress has explicitly authorized the FDIC to "transfer any sets or liability of the institution in default . . . without any approval, assignment, or *consent* with respect to such transfer." 12 U.S.C. § 1821(d)(2)(i)(I)(II) (emphasis added). Therefore, Cal. Corp. Code § 15509 conflicts with 12 U.S.C. § 1821(d) on the issue of consent. To the extent that a conflict between state and federal law makes compliance with both impossible, preemption dictates that federal law controls. *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989). Because Congress specifically exempted the FDIC from having to obtain any consent when effectuating the sale or transfer of receivership assets pursuant to 12 U.S.C. § 1821(d), Cal. Corp. Code § 15509) is preempted in this case. *See Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 675 (2d Cir.) (holding that to the extent the anti-eviction provisions of New York's rent regulations interfere with the operation of 12U.S.C. § 1821(c), the state regulations are preempted b FIRREA), *cert. denied sub nom. Solomon v. Resolution Trust Corp.*, __ U.S. __, 115 S. Ct. 2609 *and Pattullo v. Resolution Trust Corp.*, __U.S. __, 115 S. Ct. 2609 (1995); *NVMercure Ltd. Partnership v. Resolution Trust Corp.*, 871 F.Supp. 488, 491 (D.D.C. 1994); *Resolution Trust Corp. v. Charles House Condominium Ass'n.*, 853 F. Supp. 226, 230 (Ed., La. 1994).

Finally, courts have applied § 1821(j) to insulate the

actions of the FDIC as receiver from restraint, even where the receiver is alleged to have violated state law and equitable remedies are available. *See Volges v. Resolution Trust Corp.*, 32 F.3d 50, 52 (2d Cir. 1994) (refusing to enjoin a receiver's sale of mortgages even though the sale might violate state contract law because receivers have broad powers to dispose of the assets of a failed institution as they see fit), *cert. denied*, __ U.S. __, 115 S. Ct. 2618 (1995); *Gross v. Bell Sav. Bank*, 974 F.2d 403, 407-08 (3d Cir. 1992) (holding that when the RTC performs functions assigned to it by statute, injunctive relief will be denied even when the RTC is acting in violation of other statutory schemes).

In sum, Cal. Corp. Code § 15509 is inapplicable to the facts in this case and does not affect the FDIC's broad statutory powers as receiver.

IV. *Conclusion*

The decision of the district court is AFFIRMED.

APPENDIX C — ORDER DENYING MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED SEPTEMBER 12, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SACV 93-1072-GLT

RANBIR SAHNI,

Plaintiff,

vs.

AMERICAN DIVERSIFIED PARTNERS, et al.,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

The court DENIES plaintiff's motion for reconsideration.

The court previously granted defendants' motions for summary judgment against this rescission case on the ground that, pursuant to 12 U.S.C. § 1821(j), the court lacked subject matter jurisdiction to hear plaintiff Sahni's complaint. Sahni seeks reconsideration on the ground that two recent Supreme Court cases suggest that FIRREA is not applicable to partnerships, such as the ones at issue, which were formed before the enactment of FIRREA in 1989. The court requested additional briefing on this issue.

After reviewing the parties' supplemental papers, the court

concludes Sahni's reliance on the *Landgraf* and *O'Melveny and Myers* is misplaced.

In *O'Melveny,* the FDIC sued the O'Melveny law firm for negligence. The Supreme Court held that such suits are governed by applicable state law, rather than federal common law as the Ninth Circuit had suggested. In *dicta,* the Court indicated that the FDIC's assumption that FIRREA retroactively applied to *O'Melveny* was subject to question. The Court did not decide the issue one way or the other.

In *Landgraf,* the Court held that the Civil Rights Act of 1991 was not retroactive, noting that statutes are generally presumed to be non-retroactive. However, *Landgraf* also extensively discussed exceptions to this rule.

It appears that at least two exceptions set forth in *Landgraf* apply here.

First, *Landgraf* indicates that jurisdiction rules are usually applied retroactively. Here, the court's summary judgment motion was based on its finding that section 1821(j) precluded the exercise of subject matter jurisdiction.

Second, the Court emphasized that courts need to evaluate whether laws actually have a retroactive effect. Here, it is clear that Sahni's agreement with the FDIC, the transaction involving the assets of the partnership, and Sahni's suit all took place after FIRREA became effective. Only the date of the partnership's formation predated FIRREA. After following the analysis set forth in *Landgraf,* the court concludes that FIRREA does not have a retroactive effect on this case.

Appendix C

When filing his motion for reconsideration, Sahni accurately quotes the comments of two Congressmen from Texas who indicated that FIRREA was not to apply to entities formed before the date of FIRREA's enactment. However, Sahni's analysis of legislative history is inaccurate.

The legislative analysis conducted by the defendants, especially the attorney representing one of the buyers, Continental Housing Ltd., convincingly demonstrates that the comments of the two Congressman contradict the statutory scheme set up by Congress. Defendants have cited several cases in which courts have applied provisions of FIRREA retroactively notwithstanding the comments relied on by Sahni. *Landgraf* itself warns that isolated comments placed on the Congressional Record should not be used by courts as evidence of Congress' overall legislative intent.

Finally, defendants convincingly demonstrate that, even if FIRREA were held to be non-retroactive as it applies to this case, the same result would occur under the former law. The language of section 1821(j) was taken from the preceding law without change. Legislative history suggests that 1821(j) was intended to codify existing law and case law which precluded rescission actions against the FSLIC under preexisting law.

For all of these reasons, the court concludes that its prior ruling was correct, and the motion for reconsideration is DENIED.

DATED: 9/9/94

s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER GRANTING MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED MAY 9, 1994

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Attorneys for Cross-Complainant, Federal Deposit Insurance Corporation as Receiver for American Diversified Savings Bank

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SA CV-93-1072 GLT (RWRX)

RANBIR SAHNI,

Plaintiff,

vs.

AMERICAN DIVERSIFIED PARTNERS, a California Limited Partnership; AMERICAN DIVERSIFIED INVESTMENT CORPORATION, a California Corporation; KATZ BROTHERS DEVELOPMENT CORP. II, an Illinois Corporation; and DOES 1 through 50, inclusive,

Defendants.

AND RELATED ACTIONS

Appendix D

ORDER GRANTING MOTION TO DISMISS ACTION IN ITS ENTIRETY PURSUANT TO 12 U.S.C. § 1821(j)

On April 25, 1994, the Motion To Dismiss the above-referenced case in its entirety filed by intevenor, the Federal Deposit Insurance Corporation, As Receiver For American Diversified Savings Bank ("FDIC/R") and plaintiff Ranbir Sahni's ("Sahni") Motion For Summary Judgment came on for hearing before this Court.

Ronald E. Gregg, Esq., and Dennis G. Geselowitz, Esq., of the law offices of Ronald Gregg, appeared on behalf of plaintiff Sahni; Linda J. Berberian, Esq., from the FDIC Legal Division appeared on behalf of intervenor the FDIC/R, Margaret Anne MacFarlane, Esq., of the law office of Margaret Anne MacFarlane & Associates, APC, appeared on behalf of defendants and cross-complainants American Diversified Partners, American Diversified International Corporation, Katz Brothers Development Corp., Mat Mattison dba Housing Network, Paula Quinn and Skyline Properties, Inc., and Linda L. Northrup, Esq., of the law offices of Lindsey & Northrup, appeared on behalf of defendants and cross-complainants Continental Housing Partners, Ltd., MDC Investments, Inc. and Resco Management, Inc.

The Court, having read and considered the pleadings, exhibits, cases and documents filed for and in opposition to the Motion To Dismiss, as well as the pleadings previously filed in this action, and having further listened to oral arguments, rules as follows:

For the reasons articulated by this Court at the hearing and for all the reasons set forth in the various defendants' pleadings

and papers, the Court hereby grants the Motion To Dismiss this action in its entirety as to all defendants pursuant to 12 U.S.C. § 1821(j).

In light of this Court's order and decision granting the FDIC/R's Motion To Dismiss, plaintiff's Motion For Summary Judgment is ordered off calendar.

IT IS SO ORDERED.

5-7-94

s/ Gary L. Taylor
HONORABLE GARY L. TAYLOR,
United States District Court Judge

Prepared by:

FDIC Legal Division

By: s/ Linda J. Berberian
Linda J. Berberian
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American Diversified Savings Bank

APPENDIX E — RELEVANT STATUTES

12 U.S.C. § 1464 (d) (6) (C)

Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1821 (d) (2) (B) (i), (ii), (iv)

(B) Operate the Institution

The Corporation may (subject to the provisions of section 1831q of this title), as conservator or receiver —

(i) take over the assets of and operate the insured depository institution with all the powers of the members of shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

12 U.S.C. § 1821 (d) (2) (G) (i) (II)

(G) Merger; transfer of assets and liabilities

(i) In general

The Corporation may, as conservator or receiver —

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

12 U.S.C. § 1821 (j)

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of

powers or functions of the Corporation as a conservator or a receiver.

California Corporations Code § 15509

§ 15509. Rights, powers, and liabilities of general partners

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Confess a judgment against the partnership,

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

(2) In the event of the removal or failure of re-election of a general partner, pursuant to the vote of the limited partners in accordance with the certificate, such general partner shall cease to be liable as such upon the filing of an amended certificate of limited partnership as provided in Section 15524 and 15525 hereof, and compliance by the partnership or the partner with all of the requirements of notice and publication of a former partner in a partnership without limited partners.

(Amended by Stats. 1949, c. 383, p. 690, § 1. Amended by Stats. 1963, c. 870, p. 2111, § 3.)

(2)

No. 96-608

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
DEC 26 1996
CLERK

RANBIR S. SAHNI, PETITIONER

v.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly concluded that 12 U.S.C. 1821(j) barred the court from exercising jurisdiction on petitioner's behalf to rescind a sale by the Federal Deposit Insurance Corporation (FDIC), as receiver, of certain limited partnership interests owned indirectly by a failed savings bank in the course of the FDIC's liquidation of the bank's assets.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-608

RANBIR S. SAHNI, PETITIONER

v.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 83 F.3d 1054. The orders of the district court dismissing petitioner's complaint (Pet. App. 18a-20a) and denying petitioner's motion for reconsideration (Pet. App. 15a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1996. A petition for rehearing was denied on July 18, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on October 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1970s, petitioner formed and was the sole general partner of more than 50 limited partnerships, each created for the purpose of building apartment projects financed by the Department of Housing and Urban Development (HUD Partnerships). In 1983, petitioner acquired Tokay Bank, which he intended to merge with another of his corporations to form American Diversified Savings Bank (ADSB), a California-chartered, federally insured savings and loan. California banking authorities, however, required that petitioner first divest his general partnership interests in the HUD Partnerships. Consequently, at the same time that he formed ADSB, installing himself as Chairman and CEO,[1] petitioner (i) formed American Diversified Investment Corporation (ADIC), as ADSB's wholly owned subsidiary; (ii) formed American Diversified Partners (ADP), a new limited partnership, making ADIC general partner and himself sole limited partner; and (iii) substituted ADP as general partner of the HUD Partnerships. Pet. App. 5a.

In 1986, ADSB was declared insolvent and was placed in conservatorship; by 1989, the Federal Deposit Insurance Corporation (FDIC) had become ADSB's receiver.[2] Shortly thereafter, litigation

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[1] Petitioner's involvement with ADSB was noted in *O'Melveny & Meyers* v. *FDIC*, 114 S. Ct. 2048, 2051-2052 (1994) ("Sahni and [ADSB President] Day * * * fraudulently overvalued ADSB's assets, engaged in sham sales of assets to create inflated 'profits,' and generally 'cooked the books' to disguise the S&L's dwindling (and eventually negative) net worth.").

[2] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103

arose between petitioner and the banking agencies. In 1990, the parties entered into a comprehensive settlement agreement, under which petitioner was required to make a substantial payment to the FDIC. With the exception of certain assets not relevant to this case, all ownership interests in ADSB and its controlled entities were transferred to the FDIC for liquidation. Petitioner retained a one percent interest in the distributive share of ADP partnership income. Pet. App. 6a.

Between 1990 and late 1991, the HUD Partnerships and ADP's general partnership interests therein were sold as part of the FDIC's liquidation of ADSB's assets. In 1991, the FDIC offered a bulk sale of ADP's remaining general partnership interests. Those interests were offered in combination with notes from loans made to the HUD Partnerships by ADSB, now payable by the HUD Partnerships to the FDIC. The FDIC was listed as the seller on those purchase agreements. Pet. App. 6a.

In February 1993, petitioner instituted five actions in state court against ADP, ADIC and the third-party purchasers, seeking to rescind the FDIC's sale of the HUD Partnership interests. After the cases had been consolidated, the FDIC intervened, removed the consolidated cases to federal court, and moved to dismiss for lack of subject-matter jurisdiction under 12

Stat. 83, abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board, and provided for the FDIC's succession to FSLIC's function as receiver of failed thrifts.

U.S.C. 1821(j). Pet. App. 6a.[3] The district court dismissed the case on that ground (*id.* at 18a-20a), and it denied petitioner's motion for reconsideration (*id.* at 15a-17a).

2. The court of appeals affirmed. Pet. App. 3a-14a. Initially, it found that the FDIC met the constitutional requirements for standing to intervene in this matter, because the FDIC, a party to all of the HUD Partnership sales, faced injury directly traceable to petitioner's request for rescission, namely loss of the sales, potential liability to the purchasers, and a chilling effect on future sales of ADSB assets. *Id.* at 8a. The court also concluded that the prudential requirements for standing were satisfied, since the FDIC was asserting its own rights as receiver of ADSB, and its right to liquidate ADSB's assets is protected by Section 1821(d) and (j). *Ibid.*

Next, the court rejected (Pet. App. 10a) petitioner's contention that the FDIC was not protected by Section 1821(j) because the FDIC was not acting as receiver, but rather as general partner of ADP, when it sold the HUD Partnership interests. *Id.* at 11a. The court recognized that the assets sold by the FDIC were part of the receivership estate by virtue of the chain of ownership: "(1) ADSB owned American Diversified Investment Corporation (ADIC); (2) ADIC was the general partner of American Diversified Partners (ADP); (3) ADP owned the HUD

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[3] Section 1821(j) provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver.

partnerships; (4) Therefore the HUD partnerships were the assets of ADSB." *Id.* at 11a & n.3. Since the FDIC acted "well within its broad statutory powers as receiver when it sold the HUD partnerships," the court concluded, Section 1821(j) "bars the remedy of rescission sought by [petitioner]." *Id.* at 12a.

Finally, the court of appeals rejected petitioner's contention that the FDIC violated Section 15509 of the California Corporations Code by failing to obtain petitioner's consent to the sales. Pet. App. 12a-13a.[4] The court concluded that the consent requirement was preempted by Section 1821(d)(2)(G)(i)(II), which authorizes the FDIC, as receiver, to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer."

ARGUMENT

1. Petitioner argues (Pet. 3-5) that Section 1821(j) does not bar his action for rescission in this case because (he asserts) the HUD Partnership interests were not ADSB receivership assets and the FDIC did not act as ADSB's receiver in selling them. That argument is without merit.

Petitioner does not dispute that, under state law, ADSB itself could have sold the HUD Partnership interests, exercising its control over its wholly owned subsidiary corporation, ADIC, which is in turn the general partner of ADP. Pet. 4-5. In light of the

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[4] Section 15509 provides in pertinent part that "[a] general partner shall * * * without the written consent or ratification of the specific act by all the limited partners * * * have no authority to * * * [d]o any act which would make it impossible to carry on the ordinary business of the partnership." Cal. Corp. Code § 15509(1)(b) (West 1991).

unbroken chain of ownership and control running from ADSB through ADP, the HUD Partnership interests were correctly viewed as assets within the ADSB receivership estate for liquidation purposes. See *In re Landmark Land Co. of Oklahoma, Inc.*, 973 F.2d 283, 287-290 (4th Cir. 1992) (where receiver's wholly owned subsidiary controls another entity which owns assets, such control, either as majority shareholder or general partner, is tantamount to ownership of controlled entity's assets for liquidation purposes); *Bender* v. *CenTrust Mortgage Corp.*, 833 F. Supp. 1540, 1542 (S.D. Fla. 1992) (assets of wholly owned subsidiary "are assets of CenTrust Bank" and court lacked jurisdiction to enjoin their liquidation because "it is evident that FIRREA empowers FDIC to sell a failed institution's assets, whatever they may be, free from interference by the Courts") (quoting *Gosnell* v. *FDIC*, Civ. No. 90-1266L, 1991 WL 533637, at *5 (W.D.N.Y. Feb. 4, 1991), aff'd, 938 F.2d 372 (2d Cir. 1991)), aff'd, 51 F.3d 1027, modified on other grounds on rehearing, 60 F.3d 1507 (11th Cir. 1995).[5] We are aware of no authority to the contrary.

Petitioner's contrary view—that the FDIC has no authority as receiver with respect to the HUD Partnership interests because they are directly owned by "separate and distinct" entities (Pet. 5)—ignores

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[5] Cf. *SEC* v. *American Capital Investments, Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (SEC receiver's conveyance of title to property of controlled partnership upheld as "a conclusion firmly rooted in the common law of equity receiverships"); *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1405 (9th Cir.) (SEC receivership included all assets and property controlled by subsidiaries and by limited partnership whose general partner was subsidiary), cert. denied, 506 U.S. 873 (1992).

Congress's intent through FIRREA "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 330 (1989). Congress has empowered the FDIC as receiver to "take over the assets * * * and conduct all business of the institution," "collect all obligations and money due the institution," and "preserve and conserve the assets and property of such institution," 12 U.S.C. 1821(d)(2)(B)(i), (ii) and (iv); "to realize upon the assets of the institution," 12 U.S.C. 1821(d)(2)(E); and to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent," 12 U.S.C. 1821(d)(2)(G)(i)(II). Where, as here, a failed bank holds significant assets through wholly owned subsidiaries created precisely for that purpose, the FDIC's receivership powers are reasonably interpreted to encompass such assets.

2. Petitioner argues (Pet. 5-6) that the FDIC's sue-and-be-sued clause, 12 U.S.C. 1819(a), provides a waiver of sovereign immunity that permits equitable relief—such as rescission—against the FDIC in the exercise of its statutory powers. That is incorrect. Irrespective of sovereign immunity, Section 1821(j) bars the courts from "*tak[ing] any action*, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver*." 12 U.S.C. 1821(j) (emphasis added). Every court of appeals that has addressed the matter has understood that plain language to preclude the courts from restraining the FDIC as receiver when disposing of bank assets in furtherance of its statutory

liquidation powers.[6] Rescission is treated no differently than an ex ante injunction in that regard. See *Ward* v. *RTC*, 996 F.2d 99, 103 (5th Cir. 1993) (rescission is attempt to do indirectly what cannot be done directly by injunction).[7]

Contrary to petitioner's suggestion, *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), did not hold otherwise. While this Court per-

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[6] *Tillman* v. *RTC*, 37 F.3d 1032, 1036 (4th Cir. 1994) (injunction of receivership asset sale barred); *Volges* v. *RTC*, 32 F.3d 50, 51-53 (2d Cir. 1994) (same), cert. denied, 115 S. Ct. 2618 (1995); *National Trust for Historic Preservation* v. *FDIC*, 21 F.3d 469, 470-471 (D.C. Cir.) (same), cert. denied, 115 S. Ct. 683 (1994); *Carney* v. *RTC*, 19 F.3d 950, 955-957 (5th Cir. 1994) (injunction against RTC's initiation of damages claim barred); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320, 1328-1329 (6th Cir. 1993) (rescission of asset transfer barred); *Gross* v. *Bell Sav. Bank PaSA*, 974 F.2d 403, 406-407 (3d Cir. 1992) (injunction barred even where exercise of statutory powers violates other statutory schemes); *In re Landmark Land Co.*, 973 F.2d at 290 (no injunction where receiver exercises ownership rights over failed thrift's subsidiaries); *Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703, 705 (1st Cir. 1992); see also *Rosa* v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 502 U.S. 981 (1991); *281-300 Joint Venture* v. *Onion*, 938 F.2d 35 (5th Cir. 1991), cert. denied, 502 U.S. 1057 (1992).

[7] See, *e.g.*, *Pyramid Constr. Co.* v. *Wind River Petroleum, Inc.*, 866 F. Supp. 513, 516 n.11 (D. Utah 1994) (rescission of RTC asset sale "clearly violates the statutory mandate of section 1821(j)"); see also *Trinsey* v. *K. Hovnanian at Upper Merion, Inc.*, 841 F. Supp. 694, 695 (E.D. Pa. 1994) (Section 1821(j) precludes rescission); *Manir Properties* v. *RTC*, Civ. A. No. 93-3271, 1993 WL 381445, at *2 (E.D. Pa. Sept. 29, 1993) (rescission of asset sale barred despite claim that sale violated first refusal right); *Harkness Apartment Owners Corp.* v. *FDIC*, Civ. No. 7080 (RJW), 1993 WL 138772 (S.D.N.Y. Apr. 26, 1993) (FDIC's power to liquidate is basic, rescission claims barred by 1821(j)), aff'd, 999 F.2d 538 (2d Cir. 1993) (Table).

mitted a challenge to action taken by the agency outside of its statutory authority, it affirmed that Section 1821(j)'s predecessor statute, 12 U.S.C. 1464(d)(6)(C) (1988),[8] "prohibit[ed] courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that ha[d] been granted by other statutory sources." *Coit*, 489 U.S. at 574-575. *Coit* left undisturbed uniform judicial precedent holding that Section 1464(d)(6)(C) barred collateral attack on the federal receiver's exercise of its statutory powers. See, *e.g.*, *Haralson* v. *FHLBB*, 837 F.2d 1123, 1125-1127 (D.C. Cir. 1988) ("The district court * * * recognized its lack of authority and properly declined to issue the injunction."); *Fidelity Fin. Corp.* v. *FSLIC*, 834 F.2d 741, 745 (9th Cir. 1987) (Section 1464(d)(6)(C) bars jurisdiction where receiver's asset transfer challenged); *Biscayne Fed. Sav. & Loan Ass'n* v. *FHLBB*, 720 F.2d 1499, 1503 (11th Cir. 1983) (Congress gave FHLBB "awesome amount of control and authority"), cert. denied, 467 U.S. 1215 (1984); *Gulley* v. *Sunbelt Sav. FSB*, 714 F. Supp. 819, 822 (N.D. Tex. 1989) (distribution of assets "is a basic receivership function that comes squarely within the ambit of § 1464(d)(6)(C)"), aff'd, 902 F.2d 348 (5th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); *FSLIC* v. *Hall Whispertree Assocs.*, 653 F. Supp. 148

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[8] Section 1464(d)(6)(C) provided:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

(N.D. Tex. 1986) (Section 1464(d)(6)(C) bars injunction).

3. Petitioner argues (Pet. 7) that Section 15509 of the California Corporation Code[9] cannot be preempted by 12 U.S.C. 1821(d)(2)(G)(i)(II), since the ADSB receivership predated Section 1821(d)(2)(G)(i)(II)'s enactment as part of FIRREA. Pet. 7. That is not correct.

In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court affirmed that, absent clear direction from Congress, a case will not be governed by "a federal statute enacted after the events in suit" if such application "would have a retroactive effect." *Id.* at 280. A statute has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.*

Application of those principles here is straightforward. Contrary to petitioner's view (Pet. 7), the institution of the receivership was not the relevant transaction for the purposes of retroactivity analysis in this case. Section 1821(d)(2)(G)(i)(II) authorizes the FDIC, as receiver, to "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer." For purposes of this case, then, the

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[9] Section 15509 provides that "[a] general partner shall * * * without the written consent or ratification of the specific act by all the limited partners * * * have no authority to * * * [d]o any act which would make it impossible to carry on the ordinary business of the partnership." Cal. Corp. Code § 15509(1)(b) (West 1991). Petitioner has stated that he will not consent to sale of the assets to anyone but himself. FDIC C.A. Br. 6.

relevant "events in suit" might include (i) petitioner's settlement agreement with the FDIC (which transferred all of petitioner's ownership interests in ADSB and its controlled entities to the FDIC for liquidation, except for a one percent distributive share in ADP), or (ii) the sale of the HUD Partnership interests. Both of those events post-dated enactment of FIRREA. Application of Section 1821(d)(2)(G)(i)(II) to override a consent requirement with respect to such post-FIRREA transactions is in no sense a retroactive application of the law.

In any event, even before FIRREA was enacted, transfers of receivership assets by federal banking receivers were consistently upheld despite state laws prohibiting such transfers. See *FDIC* v. *Bank of Boulder*, 911 F.2d 1466, 1473 (10th Cir. 1990) (pre-FIRREA law permitted transfer of "any assets," including letters of credit, despite Colorado general provision on transfer of letters of credit), cert. denied, 499 U.S. 904 (1991); *NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488, 1498-1499 (5th Cir. 1990) (Congress permitted transfer from receivership to bridge bank notwithstanding state law provisions preventing transfer of trustee's fiduciary responsibilities); *Valley Ranch Dev. Co.* v. *Sunbelt Sav. FSB*, 714 F. Supp. 817 (N.D. Tex. 1989) (Texas fraudulent transfer statute preempted by federal law), aff'd *sub nom. Gulley* v. *Sunbelt Sav. FSB*, 902 F.2d 348 (5th Cir. 1990), cert. denied, 498 U.S. 1025 (1991). Thus, even if prior law were applicable in this case, the result would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996

Supreme Court, U.S.
FILED
JAN 7 1997
CLERK

No. 96-608

In The

Supreme Court of the United States

October Term, 1996

RANBIR S. SAHNI,

Petitioner,

vs.

AMERICAN DIVERSIFIED INVESTMENT CORPORATION; KATZ BROTHERS DEVELOPMENT CORP. II; CONTINENTAL HOUSING PARTNERS, LTD.; MDC INVESTMENTS, INC.; PAULA QUINN; SKYLINE PROPERTIES and MATT MADISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. In his Petition for Writ of Certiorari, Petitioner pointed out that a fair reading of the relevant subsections of 12 U.S.C. § 1821(d) granting to the Federal Deposit Insurance Corporation (FDIC) receivership powers over the property and assets of a failed financial institution limits the scope of the receivership estate to the assets and property *"of the institution."* (emphasis added) (Pet. p. 4). Respondents do not dispute this observation. Instead, Respondents argue that the FDIC's receivership powers should be "reasonably interpreted" to include the power to transfer assets which, although not owned by the failed institution, may be indirectly controlled by the institution. (Opposition p. 7)

Following the logic of the Ninth Circuit Court of Appeals, Respondents rely upon applicable state law when they argue that the "unbroken chain of ownership and control running from ADSB to ADP" include the HUD Partnership interests within the receivership estate for liquidation purposes. (Opposition p. 6) Respondents claim that, "under state law, ADSB itself could have sold the HUD Partnership interests, exercising its control over its wholly owned subsidiary corporation, ADIC . . . " (Opposition p. 5). Respondents' claim, however, is highly misleading and entirely unsupported by applicable authority. The application of California Corporations Code, Section 15509(1)(b) denies American Diversified Savings Bank (ADSB) and its subsidiary American Diversified Investment Corporation (ADIC) the right to dispose of American Diversified Partners (ADP)'s Department of Housing and Urban Development (HUD)

Partnership interests absent the consent of all ADP partners. (Pet. 7; see also Opposition p. 5) And it is undisputed that as a limited partner in American Diversified Partners (ADP), Petitioner never consented to the sale of ADP's HUD Partnership interests. (Pet. p. 2) Throughout this case, Petitioner has always maintained that applicable state law prevented the sale of ADP's assets under the circumstances of this case. Respondents offer no state law authority to the contrary.

Respondents attempt to further bolster their claim by arguing that ADSB "holds significant assets through *wholly owned* subsidiaries" (emphasis supplied) (Opposition p. 7). As applied to the instant case, however, that contention is incorrect. There is only *one wholly owned* subsidiary involved in the instant case – not two, as Respondents imply.

Here, ADSB's wholly owned subsidiary is ADIC *alone* (Opposition p. 2). ADIC is the general partner in ADP (Opposition 2). It is undisputed that ADP is the owner of the HUD Partnerships – the "significant assets" referred to by Respondents – *not* ADIC, as their misguided contention suggests (Opposition p. 3). ADP is *not* wholly owned by any person or entity. Instead, it is undisputed fact that ADP is owned by ADSB *and Petitioner* together (Opposition pp. 2, 3).

Therefore, from the state law perspective, the entire premise underlying Respondents' "chain of ownership and control" is unsound.

In an effort to avoid the adverse consequences of state law application, Respondents attempt to support their opposition with the application of federal law in the

form of Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA).

Citing the Congressional intent behind FIRREA, Respondents claim that the receivership powers granted to the FDIC should be "reasonably interpreted" to encompass the HUD Partnership interests owned by ADP. (Opposition p. 7) In support, Respondents claim that the receiver's powers should be extended beyond the words of FIRREA to include the assets owned by ADP upon the flawed premise that control is the legal equivalent of ownership. In this endeavor, Respondents have entirely ignored the Supreme Court's holding in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) that in its role as receiver, the FDIC is placed in the shoes of the ADSB to work out ADSB's claims under *state law*, except where some provision of FIRREA provides otherwise. (Pet. 4)

Relying heavily upon *In re Landmark Land Co. of Oklahoma, Inc.*, 973 F.2d 288 (4th Cir. 1992) Respondents argue that a receiver's control over a separate entity is "tantamount to ownership of the controlled entity's assets for liquidation purposes." (Opposition p. 6) However, the Court in *Landmark* did not so hold. Instead, the *Landmark* Court correctly determined that the RTC, as conservator, could lawfully exercise the RTC's *ownership rights* over the subsidiaries of the institution.

> "The RTC is well within its statutory authority to take control of the Clock Tower subsidiary in which it holds a 100% ownership interest . . . *Through Clock Tower*, the RTC can then control the Landmark subsidiaries. * * * [T]he district court may not prevent the RTC from

exercising its *lawful ownership rights . . .* "
(Emphasis added.)

Landmark, p. 290)

Thus, the decision embodied in *Landmark* fully supports Petitioner's position in the instant case. In *Landmark*, by implicit reliance upon applicable state law, the District Court of Appeals for the Fourth Circuit correctly recognized the limited power of the RTC *as a shareholder* in defining the scope of the receivership estate.

Respondents' reliance upon other cases is likewise misplaced. *Bender v. CenTrust Mortgage Corp.*, 833 F.Supp. 1540 (S.D. Fla. 1992), unlike the instant case, deals with assets held solely by a wholly owned subsidiary of the failed institution. *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133 (9th Cir. 1996) and *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402 (9th Cir. 1992) are also unavailing. Both *American Capital* and *San Vicente* deal with the scope of Security and Exchange Commission receiverships. The scope of those equity receiverships relies upon the equity power of federal courts and has no relationship whatsoever to FIRREA (*American Capital*, at 1145).

2. Respondents' arguments that federal law prohibits a court from rescinding the FDIC's sale of ADP's HUD Partnership interests is unsupported by applicable authority and contrary to established law.

It is undisputed that the language of 12 U.S.C. 1821(j), subject to exceptions not here relevant, bars the district court from taking any action to restrain or affect the exercise of powers or functions of the FDIC as receiver. In addition, Respondents concede, as they must,

that in the case of *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed. 2d 602 (1989), the Supreme Court permitted a challenge to action taken by the FDIC outside of its statutory authority. (Opposition pp. 8-9). Nor do Respondents dispute Petitioner's reliance upon *Coit* for the proposition that courts may grant injunctive relief against the FDIC if the power sought to be enjoined is beyond the powers granted by statute.[1] *Coit* at 574.

In *Landmark*, the authority upon which Respondents place great reliance elsewhere, it is clearly recognized that FIRREA does not preclude injunctive relief when the receiver acts *beyond the scope* of its statutory powers. *Landmark* at 289.

Thus, if the FDIC has acted beyond its statutory powers in transferring ADP's HUD Partnership interests, FIRREA does not deprive the district court of jurisdiction to rescind those sales.

3. Respondents finally argue that Section 15509 of the California Corporations Code, prohibiting certain sales of partnership property without the consent of all partners, is preempted by FIRREA.

In 12 U.S.C. 1821(d)(2)(G)(i)(II), the FDIC, as receiver, is specifically authorized to "transfer any asset or liability *of the institution in default* * * * without any approval, assignment, or consent with respect to such transfer" (emphasis supplied). However, by the plain language of

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[1] Respondents assume that a rescission of the sale of ADP's assets would effectively operate as an injunction against such sale. (Opposition p. 8)

the statute, only "assets of the institution in default" are affected and only with respect to the FDIC acting in its capacity as receiver. Thus, where, as here, the FDIC sells assets of an entity *other than* the institution in default or acts outside of its capacity as receiver, 12 U.S.C. 1821(d)(2)(G)(i)(II) does not apply and, therefore, does not preempt the application of California Corporations Code, Section 15509.

CONCLUSION

Respondents have not disputed the proposition that this case presents an important federal question concerning the statutory power of the FDIC, as receiver, which should be settled by the Supreme Court. Nor have Respondents denied that the published decision of the Ninth Circuit Court of Appeals, which Petitioner now attacks, conflicts with the Supreme Court's decision in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994)

The Supreme Court should therefore grant the petition for a writ of certiorari.

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January 1997